DIVISION ONE
FILED: 06-08-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-1053
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
EDWARD CHARLES HOLMES,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-147651-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

Janelle A. McEachern — Chandler
Attorney for Appellant

H A L L, Judge

¶1 Edward Charles Holmes (Defendant) appeals his convictions and sentences on two counts of promoting prison contraband. Defendant argues the trial court erred in denying

his motion to suppress. Defendant also contends the court should have dismissed this case based on a violation of his right to a speedy trial. Finally, Defendant challenges the sufficiency of evidence supporting his convictions. For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 In July 2007, Sergeant B.A. with the Maricopa County Sherriff's Office began investigating instances of smuggling drugs and other contraband into the Maricopa County Fourth Avenue Jail (the Jail) in Phoenix. Based on information gathered from recordings of inmates' telephone conversations with persons outside of the Jail, B.A. determined Defendant, a nurse who worked at the Jail, would be smuggling contraband on July 23, 2007. After Defendant entered the Jail that day, B.A. confronted him and interviewed him in a conference room. B.A. audio-taped the interview.

¶3 During the interview, Defendant made incriminating statements and eventually produced from his pants pocket a tube of what appeared to be cortisone ointment but later was determined to contain tobacco, matches, and methamphetamine. Defendant explained he did not know what was in the tube because he had been given the re-packaged tube by a woman to deliver to

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Defendant. *See State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

a Jail inmate, although Defendant suspected the tube contained illegal drugs. At the conclusion of the interview, Defendant was detained and subsequently charged with two counts of promoting prison contraband.[2]

¶4 At trial, Defendant admitted to knowing the tube probably contained drugs, and he admitted to smuggling the tube into the Jail. However, Defendant claimed he did so because of telephone threats he had received from people associated with Jail inmates. The jury rejected Defendant's affirmative defense of duress, and found Defendant guilty as charged. The trial court sentenced Defendant to mitigated concurrent terms of imprisonment. Defendant timely appealed, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

I. Motion to Suppress: Voluntariness

¶5 Before trial, Defendant moved to suppress the statements he made during the recorded interview with B.A. As the bases for his motion, Defendant argued his statements were made involuntarily and in violation of *Miranda v. Arizona*,

[2] Count 1, a class 2 felony, was based on the methamphetamine; and Count 2, a class 5 felony, was based on the tobacco and matches. *See* Ariz. Rev. Stat. (A.R.S.) § 13-2505(C) (2010). Subsequent amendments to this statute do not affect our analysis.

384 U.S. 436 (1966), because "Defendant did not verbally respond that he understood his rights." The trial court held a hearing and denied Defendant's motion, concluding Defendant's statements were voluntarily made and in accordance with *Miranda*. Defendant contends the denial of his suppression motion constituted reversible error because there was no evidence that "he was read or even understood his *Miranda* warnings."[3]

¶6 In reviewing the denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to upholding the trial court's ruling. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996); *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). The trial court determines the credibility of witnesses. *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001). Although we defer to the trial court's factual determinations, we review de novo its ultimate legal conclusion. *Box*, 205 Ariz.

[3] Defendant also makes a passing reference to an exchange with B.A. during the interview in which Defendant asked whether "he should obtain an attorney," and B.A. responded that he (B.A.) "could not give legal advice." This reference is not developed into a sufficient argument that we can address on appeal. *See State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (appellate court will not consider issue on appeal when opening brief merely mentions issue and does not provide argument on it). We note, however, that Defendant's reference does not indicate an unambiguous and unequivocal request for counsel such that B.A. was required to terminate the interview. *See Davis v. U.S.*, 512 U.S. 452, 461-62 (1994); *State v. Newell*, 212 Ariz. 389, 397, ¶¶ 24-25, 132 P.3d 833, 841 (2006).

at 495, ¶ 7, 73 P.3d at 626. A trial court's ruling on a motion to suppress should not be reversed on appeal absent clear and manifest error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995).

¶7 At the suppression hearing, B.A. testified that before the interview commenced he informed Defendant of his *Miranda* rights, and Defendant nodded that he understood them. B.A. further testified that Defendant continued to make statements and never asserted his right to remain silent. Defendant, on the other hand, testified that he did not hear B.A. read him his rights. However, because the trial court determines witness credibility and resolves conflicts in testimony, B.A.'s testimony is sufficient evidence that Defendant voluntarily spoke with B.A. after being advised of his *Miranda* rights. *See State v. Keener*, 110 Ariz. 462, 464, 520 P.2d 510, 512 (1974) (trial court determines weight and effect to give conflicting testimony at suppression hearing); *see also State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997) ("Answering questions after police properly give the *Miranda* warnings constitutes a waiver by conduct.") (quoting *State v. Tapia,* 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988)). Moreover, no evidence was presented at the suppression hearing that B.A. coerced Defendant to participate in the interview. Accordingly, the trial court did

not err in denying Defendant's motion to suppress.[4] *State v. Smith*, 193 Ariz. 452, 457, ¶ 14, 974 P.2d 431, 436 (1999) (coerciveness on the part of the interrogator is a necessary predicate to finding a defendant's confession is involuntary).

II. Right to a Speedy Trial

¶8 Defendant next contends that the State's dilatory tactics in satisfying its discovery obligations under Arizona Rule of Criminal Procedure (Rule) 15 resulted in a violation of his right to a speedy trial pursuant to Rule 8.

¶9 Rule 8.6 provides: "If the court determines after considering the exclusions of Rule 8.4, that a time limit established by Rule[] 8.2(a) . . . has been violated, it shall on motion of the defendant, or on its own initiative, dismiss the prosecution with or without prejudice." Rule 8.2(a)(2) requires a person named in a charging document to be tried within 180 days of arraignment if that person is released from custody. Cases designated as "complex" extend the time period to 270 days after arraignment.[5] Ariz. R. Crim. P. 8.2(a)(3). As

[4] The court found that Defendant was not in custody at the time of the interview. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) (consensual encounters with police do not implicate a Fourth Amendment interest). Defendant does not challenge this finding, and based on our disposition of the issue presented, we need not address it.

[5] If the charging document was filed between December 1, 2002 and December 1, 2005, the time limit for complex cases is one year.

relevant in this case, delays occasioned by defendant, or resulting from extension of time for disclosure, or based upon a showing of extraordinary circumstances, are excluded from the computation of the time limits set forth in Rule 8.2. Ariz. R. Crim. P. 8.4, 8.5.

¶10 Here, Defendant was arraigned on August 22, 2007, and released on bond the same day. Thus, February 18, 2008 was the last day to try Defendant. *See* Ariz. R. Crim. P. 8.2(a)(2). On January 22, 2008, the trial court granted Defendant's Motion to Designate as Complex Case pursuant to Rule 8.2(a)(3)(ii),[6] resulting in a last day of May 18, 2008. Over Defendant's objection, on May 15, 2008, the court granted the State's Motion to Extend Last Day and reset the last day—and trial—to May 27, 2008. The court found that defendant had failed to comply with Rule 8 and notify the court of the pending last day. On May 27, 2008, and again over Defendant's objection, the court granted the State's Motion to Continue, finding extraordinary circumstances existed and that a delay was indispensable to the interests of justice. Consequently, the court extended the last day to June 27, 2008, and continued the trial to June 24, 2008.

¶11 The State's Motion to Extend Last Day is listed in the record index but is not actually included in the record on

[6] Defendant's request pursuant to "Rule 8.2(b)(ii)" appears to be a typographical or clerical error.

appeal. According to Defendant, the State requested extra time so that Defendant could have further opportunity to investigate defense witnesses. Defendant contends this delay was necessitated by the State's failure to timely comply with the discovery rules. Defendant also notes that, on August 4, 2008, the court entered a nunc pro tunc order correcting its May 15, 2008 minute entry and finding that Defendant complied with Rule 8 in notifying the court of the pending last day.

¶12 The State's Motion to Continue is also not in the record on appeal. Similarly, transcripts from the May 15, 2008 and May 27, 2008 hearings are not included in the record. Thus, to the extent Defendant argues the trial court erred in granting the State's motions, we assume the record supports the court's orders. *See State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982); *see also State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) ("In the absence of a record to the contrary, we must presume that the trial court acted properly."). In any event, Defendant does not explain how the five-week delay from May 18, 2008 to June 24, 2008 prejudiced him. Absent a showing that his defense was harmed by the delay, we will not find reversible error on the basis of a Rule 8 violation. *State v. Wassenaar*, 215 Ariz. 565, 571, ¶ 16, 161 P.3d 608, 614 (App. 2007).

¶13 Subsequently, pursuant either to stipulation or motion by Defendant, the trial court timely extended the last day and continued the trial three times, ultimately resulting in a last day of September 12, 2008, and a trial date of September 9, 2008.[7] The record reflects Defendant twice expressly waived the applicable time periods. Trial commenced September 9, 2008. Accordingly, considering the exclusions of Rules 8.4 and 8.5, the record does not support Defendant's contention that trial began "90 days following the expiration of his speedy trial time frame." Thus, the trial court did not abuse its discretion in failing to dismiss this case pursuant to Rule 8.6. *See Wassenaar*, 215 Ariz. at 571, ¶ 16, 161 P.3d at 614 (trial court's ruling regarding Rule 8 reviewed for abuse of discretion).

III. Sufficiency of Evidence

¶14 Finally, Defendant claims insufficient evidence supports his convictions "in light of [his] justification defense of duress." The record, however, reveals otherwise.

¶15 "We review the sufficiency of the evidence by determining whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." *State v. Kuhs*, 223 Ariz. 376, 382, ¶ 24, 224 P.3d 192, 198 (2010) (internal quotation

[7] The court made the appropriate findings under Rule 8.5(b).

omitted). "Substantial evidence is proof that reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." *Id*. (internal quotation omitted). We set aside a jury verdict for insufficient evidence only when it is clear "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). We resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finally, credibility determinations are for the jury, not the trial judge or this court. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

¶16 As he did at trial, Defendant acknowledges that he brought methamphetamine and tobacco into the Jail, which he knew was "wrong" to do. Defendant contends, however, that the State failed to prove beyond a reasonable doubt that he was not coerced into doing so. We disagree.

¶17 As noted, Defendant raised a duress defense at trial. Thus, to convict Defendant, the State had to prove beyond a reasonable doubt that Defendant's unlawful conduct was not compelled by the threat or use of immediate physical force against him or another that could result in serious physical

injury and that a reasonable person in Defendant's situation would not have resisted. *See* A.R.S. § 13-412(A) (2010).[8]

¶18 Defendant testified that he received a voice mail on July 17, 2007 from a woman who demanded he return her call. A recording of the voice mail admitted into evidence reflects the woman made the following threatening statements:

> It's very important for you to call me back. . . . It's . . . concerning someone's life, and we can do this the easy way or the hard way. If I don't get a call from you . . . you're not gonna like what's gonna happen . . . . If I don't get a phone call, . . . it's gonna be a whole new world. . . . How I got your number? The person that had your number I . . . called and met up and . . . I told her . . . she's not gonna like what's gonna happen to her if I don't get the phone number. I have a lot of connections . . . I know . . . a lot . . . of jail people in there.

¶19 Defendant testified that he returned the call because he felt "some harm would come to me." He subsequently met the woman, who then gave him the cortisone tube with instructions to give it to a particular inmate at the Jail. Defendant testified he felt "compelled" to smuggle the tube.

¶20 On the other hand, during the interview with B.A., Defendant stated, "I'm not intimidated by none of them assholes really. . . . They're not going to intimidate me." He further told B.A. that if he (Defendant) felt threatened to smuggle the

[8] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

contraband, he would have informed authorities and that "I could handle this. . . . I'm more protected than [the inmates] are." Defendant testified that he did not contact officers after receiving the July 17 voicemail.

¶21 Viewing the foregoing in the light most favorable to sustaining the verdicts, the jury could have reasonably concluded that Defendant was not threatened with immediate physical force. Rather, the jury could have reasonably determined that although Defendant felt "compelled" to smuggle the contraband, he could have reasonably resisted the threats by informing authorities of his predicament. Accordingly, sufficient evidence supports the jury's rejection of Defendant's duress defense.

CONCLUSION

¶22 Defendant's convictions and sentences are affirmed.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
PATRICK IRVINE, Judge